IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-974

MILWAUKEE COUNTY,

Petitioner,

vs.

CITY OF MILWAUKEE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT STATE OF ILLINOIS' BRIEF IN OPPOSITION.

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February 12, 1979.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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RESPONDENT STATE OF ILLINOIS' BRIEF IN OPPOSITION.

Respondent, People of the State of Illinois, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the order of the United States Court of Appeals for the Seventh Circuit entered August 24, 1978, denying the application of petitioner for limited intervention as a defendant.

OPINION BELOW.

On July 21, 1978, over six years after this case had been filed in the district court and over a year after the district judge had announced his decision as to liability and remedy, the petitioner Milwaukee County sought to intervene at the appellate level in the appeal by the City of Milwaukee and the metropolitan area

sewerage commissions. Milwaukee County sought to intervene for the sole purpose of arguing that the case should be dismissed—after trial and judgment had been entered—on the claim that Milwaukee County was an indispensable party and that dismissal was required by Rule 19(b) of the Federal Rules of Civil Procedure. Appellees State of Illinois and State of Michigan opposed intervention on two grounds: a) that the petition to intervene was not "timely" within the requirements of either Rule 24(a) or 24(b) of the F. R. C. P. and, b) that "taxpayer" interests as allegedly represented by Milwaukee County had already been exhaustively represented by the Metropolitan Sewerage Commission of the County of Milwaukee, the Sewerage Commission of the City of Milwaukee and the City of Milwaukee. These defendants had put in extensive evidence at trial relating to alleged taxpayer impact. Thus under Rule 19(a), the County was not a person "to be joined if feasible" [Rule 19(a)(2)(i)]. Moreover, Milwaukee County had failed to address the equitable criteria of Rule 19(b) as articulated in *Provident Tradesmens Bank and Trust Co.* v. *Patterson*, 390 U. S. 102, 111 (1967).

On August 24, 1978, the Court of Appeals denied Milwaukee County's petition to intervene. This unpublished order appears at pp. 62-63 in the Appendix to the instant petition.

JURISDICTION.

Petitioner seeks to invoke this Court's certiorari jurisdiction under 28 U. S. C. § 1251(1) [sic][1] and under 28 U. S. C. § 2101(e). Rather than falling within 28 U. S. C. § 2101(e) (certiorari prior to judgment in the Court of Appeals), the instant petition is out of time under 28 U. S. C. § 2101(c). The petition was filed more than 90 days after the date of the order by the Court of Appeals denying intervention—August 24, 1978. Consequently this Court has no jurisdiction to consider the petition.

1. The petitioners' jurisdictional citation should be to 28 U. S. C. § 1254(1) as the basis for certiorari jurisdiction.

STATEMENT OF THE CASE.

There are several areas where the Statement of the Case in the petition is either inaccurate or incomplete.

1. The complaint below had its jurisdictional basis in 28 U. S. C. § 1331 and in the district court's pendent jurisdiction over related state law claims. Diversity jurisdiction was not a basis for jurisdiction as a state is not a citizen within the meaning of 28 U. S. C. § 1332. See *Illinois* v. *Milwaukee*, 406 U. S. 91, 97 n. 1 (1972).

2. In 1972 this Court ruled that the City of Milwaukee was not an entity of the state so as to invoke the exclusive jurisdiction of the Court under 28 U. S. C. § 1251(a)(1). *Illinois* v. *Milwaukee*, 406 U. S. 91, 98 (1972). Given its busy docket, the Court declined to exercise its concurrent jurisdiction over the suit by the State of Illinois against the City of Milwaukee under 28 U. S. C. § 1251(b)(3). Instead the Court articulated the presence of a federal common law of nuisance which would allow an original action in a federal district court under the district court's "federal question" jurisdiction—28 U. S. C. § 1331(a).

3. Pursuant to this Court's decision in *Illinois* v. *Milwaukee*, the State of Illinois filed a suit against Milwaukee[2] in federal district court charging that Milwaukee's discharge of massive amounts of raw and improperly treated sewage were creating a serious health hazard and an aesthetic nuisance for the Illinois citizens who use Lake Michigan for recreation and water supply.

4. Over the next five years, both plaintiff State of Illinois and the defendants engaged in massive discovery and pre-trial prepa-

2. The Milwaukee metropolitan area defendants were the Metropolitan Sewerage Commission of the County of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the City of Milwaukee. Together these three defendants had complete control over the construction and operation of all sewage collection and treatment systems at issue in the lawsuit.

ration. At no time in that five year period did Milwaukee County seek to intervene for any reason even though the suit and the pre-trial preparations received massive publicity.

5. The trial below began in January, 1977 and with some interruptions continued for six months.

6. At the trial, the evidence established that defendants had intentionally and knowingly overloaded their sewage collection system by connecting more and more new sewage sources with large diameter sewers into smaller low capacity sewers downstream. The result is that raw sewage flows from literally hundreds of overflow devices into local rivers and then as a massive slug of fecal contamination into Lake Michigan. The raw sewage that reaches the two treatment plants often receives little if any treatment and the equivalent of raw sewage is often discharged from the defendants' sewage treatment plants.

7. The raw and improperly treated sewage contains billions of pathogenic (disease causing) viruses and bacteria which can cause kidney disease, heart disease, lung disease, and birth defects and illnesses of the central nervous system.

8. These pathogens—especially viruses—are especially long-lived and can exist in Lake Michigan for several months. The evidence at trial established that nearshore currents can and do move waters discharged at Milwaukee down into Illinois waters in as little as two to four days.

9. Based on testimony by leading public health and sewage treatment experts, including one of the federal government's top experts in virology, the Court concluded that raw sewage should be collected and be given advanced waste treatment and disinfection prior to discharge into Lake Michigan. This advanced waste treatment essentially involves the removal of fecal solids and organic material through the use of coagulation and filtration prior to disinfection. A high degree of removal of fecal solids and organic material is essential for effective disinfection by chlorination.

10. The coagulation/filtration treatment ordered by the district court is typical of sewage treatment being installed around the country to protect high quality waters such as Lake Michigan. Indeed, in other areas of the country even more stringent standards have been ordered to protect sensitive waters. Such strict effluent limitations have typically been imposed to protect high quality waters under the states' residual authority under § 510 of the Clean Water Act, 33 U. S. C. § 1370, or under water quality related effluent limitations developed under §§ 302 or 303(d) of the Clean Water Act. Such effluent limitations are more stringent than the bare minimum secondary effluent limitation of § 301(b)(1)(B) of the Clean Water Act.

At trial the Milwaukee area governmental defendants attempted to claim that the effluent limitations and treatment plant improvements ultimately ordered by the judge would cost several hundred million dollars and have severe taxpayer impact. However the proof at trial was that the cost of the sewage treatment plant improvements and standards is about 60 million dollars, or less than two dollars per household per month.[3]

Throughout the course of the several month trial, Milwaukee County never sought to intervene. Indeed it was not until July 21, 1978—a year after the trial judge had announced his decision and after the appeal had been briefed and argued in the Court of Appeals—that Milwaukee County sought to intervene. Such lethargy must again be viewed in light of the massive publicity surrounding the trial and the district court's decision.

Following the Court of Appeals' order of August 24, 1978 denying intervention, petitioner waited until December 13, 1978—111 days after the Court of Appeals' decision—to petition this Court for a writ of certiorari.

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3. This estimate assumes *no* federal grant assistance. Under the Clean Water Act, up to 75% of the construction costs may be funded by a grant from the United States Environmental Protection Agency.

11. Petitioner's sole interest in this litigation is entirely derivative—it seeks to participate as a representative of Milwaukee-area taxpayers. But these taxpayers have been aggressively represented throughout this litigation by respondents City of Milwaukee, the Metropolitan Sewerage Commission, and the City of Milwaukee Sewerage Commission. These agencies were permitted to present extensive evidence on taxpayer and economic impact. Countervailing evidence on taxpayer impact was presented by the State of Illinois. Unlike the respondent Metropolitan Sewerage Commission, which is the political entity which determines the amount of tax which taxpayers will pay, petitioner simply performs a ministerial function of collecting those taxes. Petitioner serves merely as a tax collection agent for the taxes imposed by other municipal corporations.

REASONS FOR DENYING THE WRIT.

1. The Petition for a Writ of Certiorari to Review the Denial of Petitioner's Motion to Intervene Was Filed More Than 90 Days After the Court of Appeals' Decision of August 24, 1978 and This Court Therefore Lacks Jurisdiction to Review the Court of Appeals' Decision.

This Court's jurisdiction to review this order by certiorari is governed by 28 U. S. C. § 2101(c), which provides that the writ of certiorari shall be applied for within 90 days after the entry of the Court of Appeals' judgment or decree. The Court of Appeals' order, entered August 24, 1978, is an appealable order for purposes of review by certiorari. Petitioner's petition for writ of certiorari was filed 111 days after the entry of the order of the Court of Appeals of which petitioner seeks review. Thus, it is apparent that the petition is jurisdictionally out of time and must therefore be denied.

The 90 day time limit for the filing of a petition for writ of certiorari is jurisdictional and can only be extended by a timely application for an extension. Milwaukee County failed to apply for an extension under 28 U. S. C. § 2101(c). The time limitation has been rigorously enforced by this Court. *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206 (1952); cf. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 398, 418 (1923) [predecessor statute to § 2101(c)].

Here the order appealed from is the August 24, 1978 order denying intervention. That order was appealable to this Court. *International Union, United Automobile, Aerospace & Agricultural Workers* v. *Scofield*, 382 U. S. 205, 209 (1965).

The instant petition was filed on December 13, 1978—111 days after the entry of the Court of Appeals' order. No extension of time was sought and this Court does not have jurisdiction to hear the petition.

2. Even if Milwaukee County Could Wait Until a Judgment by the Court of Appeals on Matters Other Than Denial of Intervention, the Instant Appeal Should Be Denied.

Milwaukee County's appeal is from the order denying intervention and that appeal is out of time under § 2101(c). Petitioner may argue that it can wait until the Court of Appeals enters judgment on other matters before the time starts running. Such an argument would conflict with this Court's decision in *F. T. C.* v. *Minneapolis-Honeywell Regulator Co., supra.*

Even if this Court were to hold that the time for appeal of the denial of intervention does not begin until final judgment by the Court of Appeals on other matters, the instant petition should be denied. The Court of Appeals has not rendered a judgment on these other matters at this time and the petitioner has not met the requirements of 28 U. S. C. § 2101(e) and Rule 20 of the Supreme Court. Section 2101(e) provides:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

Rule 20 provides:

> A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settelment in this court.

Nowhere in the petition does the petitioner address the Rule 20 requirement that the issue be "of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." As stated above, petitioner has clearly failed to meet the 90 day limit of § 2101(e); but in any event has failed to present any justification for interrupting normal appellate processes.

3. The Court of Appeals' Order of August 24, 1978 Is Correct and the Petition Does Not Set Forth Such "Special and Important Reasons" Within the Requirement of Rule 19 of This Court, to Justify the Exercise of Discretion to Grant the Writ of Certiorari.

a. *Milwaukee County's application for intervention was not "timely" as required by Rules 24(a) and 24(b).* A basic requirement of intervention of right under Rule 24(a) or permissive intervention under Rule 24(b) is that the application be "timely" filed. *NAACP* v. *New York*, 413 U. S. 345, 365 (1973). In post-judgment attempts to intervene, the critical inquiry is whether the intervenor acted promptly after the entry of final judgment. *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 97 S. Ct. 2464, 2470-71 (1977). Where, as here, the trial court's decision was highly publicized and petitioner had an opportunity to seek intervention before the trial court, the year-long delay rendered petitioner's application untimely. *See, e.g., United States* v. *United States Steel Corp.*, 548 F. 2d 1232, 1235-36 (5th Cir. 1977). Not only does petitioner offer no excuse for its delay, but the relief it seeks—reopening the

trial and relitigating issues already tried—would be highly prejudicial to this respondent's legitimate interest in the finality of the decree.

b. *Milwaukee County is not a person to be joined if feasible within the meaning of Rule 19(a).* Preliminarily, the question must be raised as to whether this Court should consider the application of Rule 19 if Milwaukee County is not entitled to intervene and raise this issue because of its failure to seek timely intervention. The doctrine of indispensible party is an equitable, not a jurisdictional limitation.[4] And while this Court has indicated that the doctrine can be raised *sua sponte* by the Court, the assumption of such initiative by the Court seems dependent on the fact that the absent party had no opportunity to plead his case at the trial.[5] Where, as here, the absent party had ample opportunity to intervene either at trial or after the decision but sat silent, it would be highly inequitable to reward the procrastination of the absent party by this Court's raising Rule 19 *sua sponte*.

However, even if this Court chooses to consider Rule 19's applicability here *sua sponte*, Rule 19 does not require reopening the judgment. The first inquiry is whether Milwaukee County is a person to be joined if feasible under Rule 19. Milwaukee County claims it is a person "to be joined if feasible" under the criterion of Rule 19(a)(2)(i):

> "he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . ."

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4. See *Tryforos* v. *Icarian Development Co.*, 518 F. 2d 1258, 1265 n. 26 (7th Cir. 1975).

5. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 111 (1967).

> "When necessary, however, a court of appeals should, on its own initiative, take steps *to protect the absent party, who of course had no opportunity to plead and prove his interest below.*" (Emphasis added)

Yet the interest asserted here by Milwaukee County is essentially derivative. The County seeks to protect Milwaukee taxpayers. Yet the parties already before the Court have already raised and litigated the interests of Milwaukee-area taxpayers. Thus, the taxpayer interest has been adequately argued and considered in the absence of Milwaukee County.

Indeed, the County's role in tax matters appears on its face to be ministerial. The real taxing bodies are the sewerage commissions and the City of Milwaukee, who are already parties and who aggressively litigated the interests of Milwaukee-area taxpayers. Consequently, the disposition of the action in the absence of Milwaukee County will not impede the ability of the courts to protect and consider the taxpayers' interest.

c. *Under the criteria of Rule 19(b), equity and good conscience require that the district court judgment not be reopened.* Milwaukee County's petition for intervention, motion to dismiss and supporting memorandum in the Court of Appeals essentially asked that the district court judgment be vacated and the case dismissed or, alternatively, that the judgment be vacated and Milwaukee County be allowed to relitigate the remedy. Even assuming Milwaukee County is a person to be joined if fesaible under Rule 19(a), Milwaukee County has failed to address the equitable criteria set forth in Rule 19(b).

As set forth in *Provident Tradesmens Bank, supra,* the four interests to be considered are:[6]

1. Protection of the plaintiffs' interest. This Court emphasized the strong and legitimate interest of the successful plaintiff in preserving a fully litigated judgment:

> "Their interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum."
>
> 390 U. S. at 112

6. This Court in *Provident Tradesmens Bank* used a somewhat different order than the factors set forth in Rule 19(b), but the elements are the same. 390 U. S. at 109-112.

2. The interests of the defendant parties. Here the defendant public bodies have already litigated the interests of taxpayers, and they have not raised the joinder issue.

3. The interests of the absent party. Here again, the interests Milwaukee County seeks to assert are the derivative interests of area taxpayers. Since those interests are adequately represented by existing defendants, Milwaukee County's absence will not harm those interests.

4. The interest of the courts and the public in efficient and complete adjudication. Where, as here, these issues have been exhaustively litigated in a several-month trial, the public interest in avoiding retrial is also a factor:

> "After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent."
>
> 390 U. S. at 111

Applying these tests to the instant case, "equity and good conscience" required denial of Milwaukee County's petition and motion. Plaintiffs have a legitimate interest in preserving the existing judgment and in getting the task of cleaning up Lake Michigan underway without further litigation. Defendants have already litigated the taxpayer interest and have raised no claim or reason for Milwaukee County's joinder. Milwaukee County only claims to represent interests already adequately represented and has sat on the sidelines ignoring the opportunity to intervene. The County's delay is an equitable consideration which the Court can consider in declining to invoke equity on behalf of the absent party. *See, e.g., Parker Rust-Proof Co.* v. *Western Union Telegraph Co.*, 105 F. 2d 976, 979-90 (2d Cir. 1939); *Benger Laboratories Ltd.* v. *R. K. Lavos Co.*, 24 F. R. D. 450, 452-53 (E. D. Pa. 1959), *aff'd* 317 F. 2d 455 (3d Cir.), *cert. denied* 375 U. S. 833 (1963).

Finally, the public interest in preserving a judgment and avoiding further litigation must be recognized. A judgment exists which has resolved both issues of liability and remedy. All relevant issues have been considered, and further litigation will only guarantee future and potentially irreversible harm to Lake Michigan.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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